

No. 15495

United States
Court of Appeals
for the Ninth Circuit

SLEEPER LOUNGE COMPANY, a Co-partnership Consisting of Charles Kunzelman and James A. Anderson; CHARLES KUNZELMAN and JAMES A. ANDERSON,

Appellants,

vs.

BELL MANUFACTURING COMPANY, a Corporation,

Appellee.

Supplemental
Transcript of Record

Appeal from the United States District Court for the
Southern District of California
Central Division.

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PAUL P. O'BRIEN,

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Appeal from the United States District Court for the
Southern District of California
Central Division.

In the United States District Court, Southern
District of California, Central Division

No. 17,779-TC—Civil

BELL MANUFACTURING COMPANY.

Plaintiff,

vs.

SLEEPER LOUNGE CO., a Co-Partnership, Con-
sisting of Charles Kunzelman and James A.
Anderson,

Defendants.

Honorable Thurmond Clarke, Judge, Presiding.

REPORTER'S PARTIAL TRANSCRIPT
OF PROCEEDINGS

Appearances:

For the Plaintiff:

ADELBERT SCHAPP and
ELLIOTT & PASTORIZA, by
WILLIAM J. ELLIOTT.

For the Defendants:

LYON & LYON, by
R. DOUGLAS LYON.

HAROLD JOHN MILLER

called as a witness for the plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: State your full name, please.

The Witness: Harold John Miller.

Direct Examination

By Mr. Schapp:

Q. Mr. Miller, will you please give your full name? A. Harold John Miller.

Q. Your age? A. 56.

Q. Your residence?

A. 825 Geary Street, San Francisco.

The Court: That is your office, isn't it?

The Witness: No; that is my home. I have an apartment.

The Court: Oh, I see.

The Witness: Two blocks from the office.

Q. (By Mr. Schapp): Your occupation?

A. President, Bell Manufacturing Company.

Q. You are president at the present time. How long have you been president of the Bell Manufacturing Company? [3*]

A. Since November of last year.

Q. How long have you been connected with the plaintiff corporation?

A. About 15 or 16 years.

Q. About 16 years? A. 15 years.

Q. At the time you joined the organization, what was its legal structure?

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Harold John Miller.)

A. It was a partnership.

Q. A co-partnership? A. Co-partnership.

Q. Do you remember the names of the partners?

A. Joseph D. Bell and Pearl B. Taylor.

Q. And has there been any change in the legal structure?

A. The co-partnership reverted to a corporation in 1947.

Q. And the corporation took over all the assets of the co-partnership? A. That is right.

Q. Was there any change in the relationship between the two partners?

A. Well, they just became officers in the corporation.

Q. They became officers in the corporation, but in their personal relationship? [4]

A. They were eventually married in 1948.

Q. So Miss Taylor became Mrs. Bell afterward?

A. Yes.

Q. And those two names that are used mean the same person? A. That is right.

Q. How long have you known Mr. Bell?

A. I met him in 1915.

Q. 1915? A. Yes.

Q. Can you relate the circumstances under which you met him?

A. Yes. He manufactured a certain bed-davenport device, and the department I was in purchased 9,000 of them, and I met him in the course of the negotiation then, in the use of the device.

(Testimony of Harold John Miller.)

Q. Mr. Bell was in the furniture business at that time?

A. He manufactured this bed-davenport device.

Q. What became of the two partners?

A. Well, they both died—Mr. Bell in 1951 and Mrs. Bell just a few months ago.

Q. Where is your place located in San Francisco? A. 1020 Geary Street.

Q. Have you got any branches? [5]

A. Yes, we have. We have a branch in Oakland, in San Jose, two in Los Angeles, one in Pasadena.

Q. Will you please identify the two branches in Los Angeles?

A. One is at 1001 South Hill, and the other is at 4076 South Crenshaw Boulevard.

Q. Do you happen to know the location of the defendant?

A. I have an idea that it is on Wilshire, I understand, in the 3000 block, I understand.

Q. Is that somewhere in the neighborhood of any one of your stores?

A. I think it is about 20 or 25 blocks from one of our stores. I believe it is nearest the Crenshaw store.

Q. What kind of goods does the plaintiff manufacture?

A. Well, we make convertible furniture: Bed-chair, convertible bed-davenports, lounging chairs, heart-rest chairs.

Q. I call your attention to a chair standing here; is that an article of your manufacture?

(Testimony of Harold John Miller.)

A. That is our Wonder Chair.

Q. Will you please explain the construction and operation of this chair?

A. Well, it is essentially a mattress——

Q. Better come over here.

A. ——contained within the frame (stepping down from [6] the witness stand).

Mr. Schapp: Talk loud enough for the reporter here.

The Court: Shall we call the chair Plaintiff's Exhibit 1, for the record? Is that satisfactory?

Mr. Schapp: Exhibit 1.

The Court: Plaintiff's Exhibit 1.

Mr. Schapp: Yes.

The Witness: First, it is a chair, and then it is also a relaxing unit. In other words, you can fit in the chair and——

The Court: Wait a minute. We will refer to it as Exhibit 1.

Mr. Lyon: Do you intend to put the chair in evidence or make some photographs of it?

The Court: Use it for the purpose of illustration.

Mr. Schapp: Yes, for the purpose of illustration.

The Court: We will call it Exhibit 1 for the purpose of illustration. Is that satisfactory?

Mr. Lyon: That is fine. Do you intend to put anything by way of photographs or anything else—or drawings of this item in evidence?

Mr. Schapp: No, except in our advertising—it appears in our advertising.

(Testimony of Harold John Miller.)

Mr. Lyon: As it shows in your advertising.

Mr. Schapp: The same chair appears in most of our [7] advertising.

(The chair referred to was marked Plaintiff's Exhibit 1 for the purposes of illustration.)

The Witness: You see, this by body movement will go to any position. I think there are distinctly about a hundred positions you can arrive at. It is a matter of body movement. There are no gadgets on this thing. And then it converts into a bed.

Q. (By Mr. Schapp): Will you please convert it into a bed?

A. Yes, it takes just a moment (a pause while the witness complies with counsel's request). Also, it can be converted into a lounge, too, by putting it in this position, for lounging and relaxation, and for televiewing, too. This is very good for televiewing.

The Court: Do you want him to resume the stand now, or——

Mr. Schapp: Well, we might.

You might resume your witness chair, now.

(The witness resuming the witness stand.)

Q. (By Mr. Schapp): How long have you been—has your concern been selling these chairs?

A. I think in 1938 was the first sale of that particular chair.

Q. Since '38. Does Bell Manufacturing Company

(Testimony of Harold John Miller.)

manufacture and sell any other chairs of similar character? [8]

A. Well, we make another type, our so-called Heart-Rest Chair, and this we widen out and make into a love seat, and then we combine two of these in one housing—we call it a twin recliner.

We make a bed-davenport that converts. There are two bed-davenports that convert.

Q. And are those, then, sold under the name——

A. We use the term “Wonder” in conjunction with all of those, yes.

Q. Wonder Chair. Is this chair and some of the other chairs you are selling of conventional character? A. What do you mean? As a chair?

Q. Yes. A. Well, I would say so.

Q. Is there anything unusual about it?

A. Well, the fact that it converts and makes into a bed. To my knowledge, it is very unusual and unique.

Q. Who developed that chair?

A. Mr. Joseph Bell.

Q. Mr. Joseph D. Bell. Did he get any patents on this chair and the particular chairs?

A. Yes.

Q. Have you got any idea about how many patents he took out on chairs of this character?

A. Well, I think all told about 17. Out of 38 patents, [9] I think 17 pertain to chairs and convertible beds.

Q. I will show you a volume of books entitled

(Testimony of Harold John Miller.)

“Joseph D. Bell’s Patented Inventions, 1913 to 1947.”

Mr. Lyon: May I see that, please?

(Mr. Schapp showing the document to Mr. Lyon.)

Q. (By Mr. Schapp): I will ask you to identify that book (handing the document to the witness).

A. Yes, this is his book. Did you want this (referring to a paper)?

Mr. Schapp: No.

The Court: Just put that in your pocket.

The Witness: Yes, this is his book.

Mr. Schapp: This book contains about 34 or 35 patents, and approximately 20 of these patents—they were all issued to Mr. Bell, and Mr. Bell made up this book.

Mr. Lyon: Your Honor, I would like to object to counsel testifying.

The Court: He just wants to put the book in evidence.

Mr. Schapp: Yes.

The Court: The book speaks for itself.

Mr. Schapp: Yes.

Mr. Lyon: I would like to object to the entry of the book in evidence, your Honor. I don’t see its materiality or relevancy to the issues in this case at all. I just don’t like to see the record get built up. I don’t see its purpose. [10]

The Court: Well, I will overrule the objection

(Testimony of Harold John Miller.)

and allow it to be received as Plaintiff's Exhibit 2 in evidence.

Mr. Schapp: All right.

(The exhibit referred to was marked Plaintiff's Exhibit 2 and was received in evidence.)

The Court: You may read any portion of it you want, rather than you stating what it contains. That is what counsel objected to, to your stating your conclusion.

Mr. Schapp: All right, your Honor.

The Court: Or you may call the court's attention to any particular pages you want and put that in the record and the court will read it.

Mr. Schapp: For the record, I have prepared a list of all these patents that relate to bed structures, etc., and perhaps counsel will stipulate that I may incorporate that list in the record.

Mr. Lyon: May I see the list?

(Mr. Schapp showing the document to Mr. Lyon.)

Mr. Lyon: I haven't had a chance to check this, your Honor, but I will take counsel's word that it is.

I of course object to the entry of a portion of the book as being irrelevant and immaterial on the same basis as before.

The Court: I will overrule the objection and let it be Exhibit 3. We will take Mr. Schapp's word for it. [11]

(Testimony of Harold John Miller.)

(The exhibit referred to was marked Plaintiff's Exhibit 3 and was received in evidence.)

Mr. Schapp: Shall I read this into the record, your Honor?

The Court: Yes, read it into the record.

Mr. Schapp (Reading): "Patents relating directly to convertible chair-beds:

"1,166,315, combined bed and seat, December 28, 1915;

"1,366,112, davenport-bed, January 18, 1921;

"1,488,144, sofa-bedstead, March 25, 1924;

"1,789,094, davenport, January 13, 1931;

"1,800,496, davenport only, April 14, 1931;

"2,120,962, twin bed couch, June 21, 1938;

"2,173,641, convertible couch, September 19, 1939;

"2,240,204, chair bed, April 29, 1941;

"2,249,266, combined chair and bed, July 15, 1941;

"2,270,576, divan bed, January 20, 1942;

"2,279,286, divan bed, April 7, 1942;

"2,281,085, chair-bed, April 28, 1942;

"2,286,948, chair-bed, June 16, 1942;

"2,287,596, chair-bed, June 23, 1942;

"2,288,775, reclining chair, July 7, 1942;

"2,293,964, chair-bed, August 25, 1942;

"2,304,298, chair-bed, December 8, 1942;

"2,326,196, convertible bed, August 10, 1943; [12]

"2,328,254, chair-bed, August 31, 1943;

"2,328,255, chair-bed, August 31, 1943."

(Testimony of Harold John Miller.)

Those are the numbers of the patents secured by Mr. Bell.

Should I leave the book?

The Court: Yes, the book is in evidence.

The Clerk: The book is Exhibit 2, and the list is Exhibit 3.

Q. (By Mr. Schapp): Now, Mr. Miller, is your chair, this particular chair that the Bell Manufacturing Company manufactures different from any other chair in the market, as far as you know?

A. Well, it is unique, as I was saying. It converts into lounges and relaxes, all combined in one chair.

Q. Do you know whether the validity of the present patents I just referred to has ever been questioned? A. No.

Q. Has Mrs. Bell ever been forced to resort to a patent suit, as far as you know? A. No.

Q. Now, Mr. Miller, are you using any trademark in connection with this chair?

A. We use the term or the mark "Wonder Chair."

Q. How long have you been using that trademark?

A. It seems to me since 1938—1938.

Q. Since 1938? [13] A. Yes.

Q. And you have used it ever since?

A. Oh, yes.

Q. Have you used it in interstate trade ever since? A. Yes.

(Testimony of Harold John Miller.)

Q. Do you use it on any other pieces of furniture?

A. Well, as I inferred, we use it on our Wonder Love Seat, Wonder Twin Recliner, Wonder Cushion Davenport, and Wonder Bed-Davenport, in addition to the Wonder Chair.

Q. As far as you know, since you began using the trade-mark "Wonder Chair," has this trade-mark ever been infringed?

Mr. Lyon: Your Honor, I object; that is calling for an opinion. That is what the court is here to decide.

The Court: Yes; I will sustain the objection.

Mr. Schapp: May I reword the question, your Honor?

The Court: Yes, sir.

Q. (By Mr. Schapp): Has any infringement of your trade-mark ever been brought to your attention?

Mr. Lyon: Same objection, your Honor.

The Court: I will overrule the objection. He may answer that.

The Witness: No.

Mr. Schapp: You overruled the objection?

The Court: Yes. [14]

The Witness: No.

Q. (By Mr. Schapp): Have these chairs always carried that trade-mark by way of labels?

A. Oh, yes.

Q. They have always been identified by the label?

A. Yes.

(Testimony of Harold John Miller.)

Q. Now, have you done any advertising in connection with this chair and similar chairs?

A. Yes; over the years we have.

Q. I wish to bring to your attention what purports to be a sheet of the Los Angeles Examiner of Sunday, September 18, 1938. Will you kindly pick up this paper and see whether you find any of your advertisements in that paper (placing document before the witness)?

A. Yes.

Mr. Schapp: Do you want to see it?

Mr. Lyon: Please.

(Mr. Schapp showing the document to Mr. Lyon.)

Mr. Lyon: Do you have a copy of that?

Mr. Schapp: I am afraid not.

The Court: Do you want to put that in evidence?

Mr. Schapp: Yes, please. May I introduce this in evidence as——

The Court: Yes.

The Clerk: Plaintiff's Exhibit 4. [15]

Mr. Lyon: No objection.

(The exhibit referred to was marked Plaintiff's Exhibit 4 and was received in evidence.)

Q. (By Mr. Schapp): I now call your attention to a card and will ask you to identify the same.

A. Yes; that's ours.

Q. What is it?

A. It's a card announcing the catalog to be issued in 1940.

(Testimony of Harold John Miller.)

Q. That was issued by your concern?

A. Oh, yes.

Mr. Schapp: I ask that this be introduced in evidence.

Mr. Lyon: May I see it first, please?

(Mr. Schapp showing the document to Mr. Lyon.)

Mr. Lyon: No objection.

The Clerk: Plaintiff's Exhibit No. 5.

(The exhibit referred to was marked Plaintiff's Exhibit 5 and was received in evidence.)

Q. (By Mr. Schapp): Now, I will show you a folder here and I will ask you to let us have your comment on that.

A. Yes; this is ours. We called this a catalog at the time.

Q. Do you remember when that catalog was published?

A. Well, of course, I came there in '41, June, 1941. Yes. I think I came in August. Well, I used this catalog [16] in 1941 myself.

Q. 1941? A. Yes.

Q. And according to your best recollection, how long have you been using that catalog?

A. This particular catalog, this type, I think, we used up to about 1947.

Q. You used that for six years?

A. Approximately. We had about 10,000 a year printed, if I remember correctly.

(Testimony of Harold John Miller.)

Q. Did you print these in large quantities?

A. About 10,000 a year, if I remember correctly.

Q. About 10,000 a year? A. Yes.

Q. Does this feature the trade-mark "Wonder Chair"? A. Why, yes. I think it's in there.

Q. (Handing the document to the witness.)

A. Yes; "Bell's Wonder Chair."

Mr. Schapp: May I ask that this be introduced in evidence as an exhibit?

The Court: Plaintiff's 6.

Mr. Lyon: No objection.

(The exhibit referred to was marked Plaintiff's Exhibit 6 and was received in evidence.)

Q. (By Mr. Schapp): Here is an excerpt from a paper. [17] I wish you would identify it, if you can (handing document to the witness).

A. Yes; this is one of our ads.

Q. What is that?

A. I believe, offhand, this was a 1941 ad—"Bell's Wonder Chair"—'41, I believe.

Mr. Schapp: I will introduce this in evidence and ask that it be marked, your Honor.

The Clerk: Plaintiff's Exhibit 7.

Mr. Lyon: No objection.

(The exhibit referred to was marked Plaintiff's Exhibit 7 and was received in evidence.)

Q. (By Mr. Schapp): Here is another Sunday Examiner, apparently. I wish you would identify that.

(Testimony of Harold John Miller.)

A. Yes; this is one of our ads—"Bell Wonder Chair." This is '41, too, I believe. It has our Sacramento address there. We discontinued that store in 1941.

Mr. Schapp: I will ask that this be introduced in evidence as plaintiff's exhibit.

The Clerk: Plaintiff's Exhibit 8.

Mr. Lyon: Your Honor, this is becoming a little cumulative. I wonder if I can ascertain, counsel, the purpose. Then maybe we can dispose of this by way of stipulation rather than putting in all these repetitive ads of the same nature. If you want to, go ahead; but I think we might [18] dispose of the matter if I can find out why you are putting them all in.

Mr. Schapp: Yes; to show the continued history of advertising.

Mr. Lyon: I am willing to stipulate that they used the trade-mark and used it continuously since the date stated in the registration, if that will help you.

Mr. Schapp: You will stipulate——

Mr. Lyon: I will stipulate that you have used the trade-mark "Wonder Chair" and that you have used it continuously since 1938.

Mr. Schapp: All right, thank you, very much. Then I will confine myself to this one volume here, which apparently is the latest.

Q. Will you please identify that folder (handing document to the witness)?

A. Yes. This is our latest catalog, 1955 catalog.

(Testimony of Harold John Miller.)

Q. Does that feature the trade-mark "Wonder Chair"?

A. Yes, it does.

Mr. Schapp: I can furnish you a copy of this, counsel.

Mr. Lyon: Thank you, very much.

The Court: Would you like to put that in the record, too?

Mr. Schapp: Yes.

The Court: All right. [19]

Mr. Schapp: I will ask that this be marked Plaintiff's Exhibit—

The Clerk: No. 9.

(The exhibits referred to were marked Plaintiff's Exhibits 8 and 9 and were received in evidence.)

Q. (By Mr. Schapp): Do you remember the amount of money you spent on advertising, approximately?

A. In 1954 we spent in the neighborhood of \$60,000 a year, and in 1955 I imagine it will be about \$50,000.

Q. Have you used any newspapers to any extent for advertising?

A. Yes; essentially newspapers.

Q. Would you please give us your best recollection, approximately, what newspapers you have used for advertising?

A. Well, we use the San Francisco Examiner, the San Francisco Chronicle, the Los Angeles Times magazine section, home magazine section, the Los

(Testimony of Harold John Miller.)

Angeles Examiner, the San Jose Mercury-Herald, San Jose Shopping News, Oakland Tribune. I think that is about it in the way of newspapers.

Q. I now show you an issue of the Los Angeles Times of October 17, 1954, and I will call your attention to page 45 of that magazine (handing document to the witness).

A. Yes, that is our ad—"Bell Wonder Chair."

Q. I also call your attention to page 54 of that magazine and see what you discover there. [20]

A. That's the Sleeper Lounge, the Wonder Sleeper Lounge ad.

Mr. Schapp: This evidence is introduced principally for the purpose of showing that both used the same advertising media, both in the Sunday issue of the Los Angeles Times.

Mr. Lyon: No objection.

The Clerk: Plaintiff's Exhibit 10.

Mr. Schapp: I introduce this in evidence as Plaintiff's Exhibit 10.

(The exhibit referred to was marked Plaintiff's Exhibit 10 and was received in evidence.)

Mr. Schapp: Will you stipulate that the answer to Interrogatory 10 may go into evidence, without reciting it?

Mr. Lyon: Our answer to Interrogatory 10?

Mr. Schapp: No; our answer to your Interrogatory 10.

Mr. Lyon: I will not stipulate that your answer to our interrogatories can go in; no, sir.

(Testimony of Harold John Miller.)

Q. (By Mr. Schapp): Mr. Miller, at one time during this proceeding you filed answers to certain interrogatories propounded by the defendant?

A. Yes.

Q. And I wish to call your particular attention to Interrogatory No. 10, which calls for—

“Please list in detail and identify each and [21] every form of advertisement or sales media, including but not limited to brochures, other literature, television, radio, billboards, other sign displays, pamphlets, newspapers and the like, in which you have used the phrase ‘Wonder Chair,’ setting forth further when each was commenced, how long each has or did continue, and when each use was stopped, if stopped before the commencement of the above-entitled action.”

Do you remember that you prepared an answer to this interrogatory? A. Yes, I do.

Q. Did you personally collect that data on which you— A. It seems to me I did.

Mr. Schapp: May I read the answers?

The Court: Yes.

Mr. Lyon: Your Honor, I am not going to object to the introduction of this particular answer. It is objectionable as being a self-serving declaration, but I don't want my silence to be interpreted as admitting the admissibility of any other answers.

The Court: All right. I will overrule the objection. You may read it.

Mr. Schapp: “Answer: (1) Catalogs from at least 1940 to the present;

(Testimony of Harold John Miller.)

“(2) Los Angeles Times Magazine Section [22] from approximately 1951 to the present;

“(3) Oakland Tribune from at least 1940 to the present”;

(Reporter’s note: No. 5 was not read.)

“(6) San Jose Mercury-Herald, for about one year to the present;

“(7) San Jose Shopping News for about one year to the present;

“(8) Los Angeles Examiner from 1938 to the present;

“(9) Radio, San Jose and Salinas, for about six months to the present;

“(10) Radio, San Francisco, Fulton Lewis, Jr., from 1948 to 1951;

“(11) Radio, Los Angeles, Fulton Lewis, Jr., for one month in 1951;

“(12) Television, Northern California, approximately from 1949 to 1954.”

Are those answers correct, to the best of your knowledge? A. That is right.

Q. Do you happen to remember how much you paid Fulton Lewis, Jr.?

A. I think that program used to cost us about \$1,600 a month, and then when we added Los Angeles it was \$5,000 a month.

Mr. Schapp: Thank you. [23]

Now, your Honor please, I desire to introduce in evidence some official documents.

Do you want to see these?

(Testimony of Harold John Miller.)

Mr. Lyon: I have seen them.

Mr. Schapp: This is Trade-mark Certificate No. 377752, issued by the United States Patent Office to Bell Manufacturing Company of San Francisco on the 14th day of May, 1940. The certificate especially provides that it was issued under the act of February 20, 1905, and the certificate also provides——

Mr. Lyon: Your Honor, the document speaks for itself, I believe.

The Court: Well, I will——

Mr. Lyon: If he wants to introduce it in evidence, let him introduce it.

The Court: Well, certain counsel have a certain way they like to do things. I will let him proceed.

Mr. Schapp: Thank you.

The Court: Maybe that is the way they do it in San Francisco, in other words.

Mr. Schapp: The certificate also provides that the word "chair" is disclaimed apart from the mark as shown, which accentuates the idea of the word "Wonder." I ask that this be introduced in evidence as——

The Clerk: Plaintiff's Exhibit 11. [24]

Mr. Schapp: ——Plaintiff's Exhibit 11. I also wish to introduce in evidence an assignment (showing document to Mr. Lyon).

Mr. Lyon: Your Honor, we will stipulate that the plaintiff corporation is the owner of the registration, to save them the trouble of introducing that, if they like.

Mr. Schapp: Thank you, very much.

(Testimony of Harold John Miller.)

The Court: All right.

Mr. Schapp: Next I desire to introduce in evidence a file wrapper, a copy of the file wrapper as it exists at the present time in the United States Patent Office. This file wrapper is introduced principally for the purpose of showing that all the necessary steps have been taken to secure the incontestability of the trade-mark under the 1946 Act.

The Court: All right.

Mr. Schapp: I wish to introduce this in evidence.

The Clerk: Plaintiff's Exhibit 11.

Mr. Schapp: As Plaintiff's Exhibit 11.

(The exhibit referred to was marked Plaintiff's Exhibit 11 and was received in evidence.)

Mr. Schapp: And I would like to call your Honor's attention to a few pages here, if I may.

The Court: Certainly.

Mr. Schapp: The prosecution of the case has been of the normal kind, but it should be noted that the Patent Office, [25] when this application was filed, apparently found no record in its own records against his application where the word "Wonder" played any part, so as to deny registration to the applicant, Bell Manufacturing Company.

Then I wish to call your Honor's attention to page 9—that's the official counting of pages by the Patent Office—page 9, which gives a copy of the affidavit under Section 12(c), reading as follows:

"Joseph D. Bell, being duly sworn, deposes and says that he is a member of the Bell Manufacturing

(Testimony of Harold John Miller.)

Company, a copartnership, and owner of Registration No. 377752, above identified, as evidenced by the accompanying title report * * *”—the title report filed with it.

“* * * that said registration is now in force; that the trade-mark described therein is in use in commerce among the several states on each of the following goods named in said registration, reclining chairs and convertible chair-beds, in Class 32 furniture and upholstery, and claims the benefits of the Trade-mark Act of 1946 for said trade-mark.”

That brings it officially within the Act of 1946.

Mr. Lyon: Your Honor, I will object to the introduction of that affidavit, unless it is solely for the purpose of proving that such affidavit was filed. If it is offered for [26] the purpose of proving the facts stated therein, I have not had an opportunity to cross-examine the affiant and I do not believe it is admissible. It is hearsay.

Mr. Schapp: That is perfectly satisfactory.

The Court: All right.

Q. (By Mr. Schapp): Mr. Miller, you are familiar with the history of Bell Manufacturing Company? A. Yes.

Q. At the time of the filing of this affidavit, which was on the 26th day of September, 1947, was the trade-mark in use in commerce at that time by the Bell Manufacturing Company? A. Yes.

Mr. Lyon: I believe I have already stipulated that it has been continuously used, if that is your purpose.

(Testimony of Harold John Miller.)

Mr. Schapp: Beg your pardon?

Mr. Lyon: I say, I believe I have already stipulated that you have continuously used the mark, if that is the purpose.

Mr. Schapp: Yes; I just want to get evidence that the statements in this affidavit are supported by additional testimony.

The Court: All right.

Mr. Schapp: In fact, that will be all that is necessary on that part of it. [27]

Then I wish to call attention to page 12 of the record, in which the Patent Office notifies Bell Manufacturing Company that the trade-mark was republished in the Official Gazette on September 14, 1948.

That is the final step to bring it within the 1946 Act. The law provides that after getting under the 1946 Act, after the expiration of five years, you are supposed to file another affidavit, a combined affidavit, under Sections 5 and 8 and 15, and this was duly filed and recorded on page 18 and page 19 of the records of the Patent Office; and in this affidavit Pearl B. Bell swears that said corporation is the owner of Registration No. 377752 and republished on September 14, 1948, as evidenced by the accompanying title report; that the mark described therein has been in continuous use in commerce among the several states for five consecutive years.

Q. Can you testify to that, that it has been in continuous use for the five consecutive years prior to the filing of this affidavit? A. Yes.

(Testimony of Harold John Miller.)

Mr. Schapp: That from September 14, 1948, to the date of this affidavit, subsequent to the date of application, on or in connection with the following goods: Reclining chairs and convertible chair beds, as stated in the registration.

Q. Do you find all those facts to be true? [28]

A. That is right.

Mr. Schapp: That the mark is still in use in commerce among the several states.

Q. Was that true at that time?

A. That is right.

Mr. Schapp: And in connection with said reclining chairs and convertible chair-beds—was that true? A. That is right.

Q. As evidenced by the specimen filed herewith, which is in use on said goods at the present time.

Now, I have to ask you a few more questions.

That there has been no final decision adverse to said corporation's claim of ownership of said mark for such goods?

The Witness: No.

Q. (By Mr. Schapp): At that time there had been no final decision? A. That is right.

Q. Or its right to register the same?

A. No.

Mr. Schapp: Speak out loud so that the reporter can hear you.

The Witness: No, sir.

Q. (By Mr. Schapp): Or to keep the same on the register? A. No, sir.

Q. And that there is no proceeding involving

(Testimony of Harold John Miller.)

said [29] rights pending in the Patent Office or in court and that finally disposed of? A. No.

Q. There was no proceeding pending at that time? A. No.

Mr. Schapp: Now, I wish to call attention to page 20, which is official notice from the patent office that the combined affidavit under Sections 8 and 15 has been duly filed and approved and found acceptable.

Did I offer this in evidence?

(Mr. Schapp handing the document to the clerk.)

Mr. Lyon: Your Honor, I believe this is the first offering of that, and I would not object to its admissibility for the purpose of showing that the steps have been complied with in the Patent Office; but I do object if it is offered for the purpose of proving the truth of any of the averments of the affidavit, on the grounds that they are self-serving declarations and merely hearsay.

The Court: He wanted to prove the various steps in the Patent Office.

Mr. Lyon: If that is the only purpose, I have no objection. I don't want to admit any of the facts alleged in there are actual facts.

Mr. Schapp: You are not asked to admit anything. I just asked Mr. Miller whether those facts were true. [30]

The Court: I will allow it to be received.

Mr. Schapp: Thank you.

(Testimony of Harold John Miller.)

The Clerk: Plaintiff's Exhibit 12.

(The exhibit referred to was marked Plaintiff's Exhibit 12 and was received in evidence.)

Mr. Schapp: I now desire to introduce in evidence a copy of "Huntington Hartford Theatre" and wish to call attention to page 26, which shows an advertisement of the Sleeper-Lounge bed, with the words "Wonder Bed" displayed, as appears from the advertisement. The advertisement carries the notations in ink and I will ask that those notations be disregarded.

Mr. Lyon: No objection.

Mr. Schapp: I understand counsel is willing to stipulate that this may be introduced.

Mr. Lyon: No objection.

The Court: All right, it may be received.

The Clerk: Plaintiff's Exhibit 13.

(The exhibit referred to was marked Plaintiff's Exhibit 13 and was received in evidence.)

Mr. Schapp: I have another copy of the same magazine. I further wish to introduce in evidence another copy of the "Huntington Hartford Theatre," page 22, which shows a similar advertisement.

Mr. Lyon: For your information, this is formally known [31] as "The Play-Goer." It is a magazine that is put out in this town for our local theatre. I think it would be properly clear in the record if you refer to it as that.

The Court: Play-Goer?

(Testimony of Harold John Miller.)

Mr. Lyon: Yes.

Mr. Schapp: Counsel calls my attention to the fact that these two magazines should be referred to as "The Play-Goer."

The Clerk: Plaintiff's Exhibit 14.

(The exhibit referred to was marked Plaintiff's Exhibit 14 and was received in evidence.)

Mr. Schapp: Next I desire to introduce in evidence another advertisement, being a photograph of a billboard, carrying the sleeper-lounge ad.

Mr. Lyon: May I ask when that photograph was taken? Do you know, counsel?

Mr. Elliott: Approximately two months ago.

Mr. Lyon: Approximately two months ago. No objection.

Mr. Schapp: I ask that this be introduced.

The Clerk: Plaintiff's Exhibit 15.

Mr. Lyon: Counsel, in which location was that billboard?

Mr. Elliott: That was the one right off Olympic. I don't remember the cross street.

(The exhibit referred to was marked Plaintiff's Exhibit 15 and was received in evidence.)

Mr. Schapp: I now desire to bring to the [32] court's attention the defendants' answers to plaintiff's Interrogatory No. 7—the question read:

"Please list in detail and identify each and every form of advertisement or sales media, including brochures, other literature, television, radio, bill-

(Testimony of Harold John Miller.)

boards, other sign displays, pamphlets, newspapers and the like, in which you have used or authorized the use of the phrase 'The Wonder Bed' and/or the phrase 'Wonder Bed,' setting forth further when each use was commenced, how long each use has or did continue, and when each use was stopped, if stopped before the commencement of the above-entitled action."

Then the answer to this interrogatory is:

"As presently advised, defendants believe that the descriptive phrase, 'The Wonder Bed,' was probably used in the following advertisements:"—

Now, does your Honor desire to have this read into the record?

The Court: You might read it into the record. I think that is the best way.

Mr. Schapp: "(1) Brochures—15,000 printed for use as of August 31, 1954;

"(2) Truck sides painted, September 17, 1954, one truck currently in use;

"(3) Billboards—three in use, one since October [33] 15, 1954; two as of November 8, 1954;

"(4) L. A. Times Home Magazine—October 3, 1954, also October 17th and 31st, November 7th, 14th, 21st and 28th, December 5th, 12th, 19th, 26th, January 2nd, 9th, 16th, 23rd, 30th, February 13th, 20th and 27th;

"(5) Los Angeles Examiner Pictorial Magazine—November 7, 1954, also November 14th, 21st and 28th, December 5th, 12th and 19th, January 2nd, 9th, 16th and 23rd;

(Testimony of Harold John Miller.)

“(6) Catholic Directory, October publication date annual;

“(7) Hollywood Reporter—October 11, 1954, plus October 26th, November 8th and 23rd, December 3rd, 9th and 15th;

“(8) Daily Variety—October 7, 1954, plus October 20th, November 5th, 17th and 29th, December 9th and 14th;

“(9) Play-Goer—October, 1954, all weeks, also weeks of November 22nd, November 29th, December 6th and 13th;

“(10) Beverly Hills News Life—October 13, 1954; October 18th and 25th, November 8th, 15th, 22nd and 29th, and December 6th;

“(11) Canyon Crier—October 14, 1954; October 28th, November 11th and 25th, December 9th;

“(12) Christmas mailers—1,000 completed December [34] 9, 1954;

“(13) Los Angeles Herald-Express—November 25, 1954;

“(14) KCBH radio spots, month of December, 1954;

“(15) Pasadena Star News—December 3, 1954, and December 10th;

“(16) Newport-Balboa News—December 7, 1954;

“(17) Newport-Balboa Press — December 2, 1954;

“(18) Hollywood Citizen-News—December 3, 1954, and December 10th;

“(19) Valley Times—December 3, 1954; December 7th and 10th;

(Testimony of Harold John Miller.)

“(20) Los Angeles County Medical Directory, Annual, December, 1954.”

Q. Now, Mr. Miller, referring to the photograph of the billboard introduced in evidence as Exhibit 15, I will ask you to compare the position of that lady sitting on the device with a person seated on your chair, if your chair is posed at the proper angle.

A. Well, we call this our “hips down, knees up” position. We have used that for years.

Q. Referring to this chair, for instance, if I tilt this in this manner, it would be done by body movement? A. Yes.

Q. If I tilt it like this, would the position of a [35] person sitting in this chair be just about the same as the position of that lady?

A. Well, I would say so—in other words, hips down, knees up.

Q. Hips down, knees up? A. Yes.

Q. As a matter of fact, this “hips down, knees up” is a feature you have featured for a good many years in your advertising?

A. Yes. I mean, we mention that in selling, too.

Mr. Lyon: May I hear the answer to that question, please?

The Witness: I say, we mention that in selling, too.

Q. (By Mr. Schapp): Mr. Miller, what class of customers do you sell these chairs to, principally?

A. Well, I would say offhand middle-aged and older people. That’s our general——

(Testimony of Harold John Miller.)

Q. Do you ever have an opportunity of selling any of these chairs to hospitals?

A. Well, the hospitals have used them. As a matter of fact, most of the state psychiatric hospitals have them now. I don't know how they use them, but they have them.

Q. They are particularly used for invalids?

A. You mean by the state?

Q. Yes. [36]

A. Frankly, I don't know. All I know is that we have sold them all. I never checked into it. I remember at one time we sold the Stanford people in their psychiatric department, something about an electric—I forget what they call it.

Mr. Lyon: Can you speak up, please, Mr. Miller? I can't hear you.

The Witness: I say, we sold the Stanford Hospital, in their psychiatric department. They bought one or two chairs.

The Court: Well, it is noon, Mr. Schapp. I know you are from San Francisco. Ordinarily we stop at this time.

Mr. Schapp: All right.

The Court: We will recess until 2:00 o'clock. You are probably down from San Francisco, and Mr. Miller. You intended to be here for two or three days on this trial, didn't you?

Mr. Schapp: Yes.

The Court: Is 2:00 o'clock satisfactory?

Mr. Schapp: Yes, thank you.

The Court: All right, recess until 2:00 o'clock.

(Noon recess.) [37]

(Testimony of Harold John Miller.)

January 25, 1956—2:00 P.M.

Direct Examination
(Resumed)

By Mr. Elliott:

Q. Mr. Miller, will you kindly tell us, if you can, or at least give us an estimate of what proportion of your gross business has been done in the Los Angeles area? A. About 50 per cent.

Q. About 50 per cent? A. Yes.

Q. During what period has that been?

A. Well, last year's business, '54's business. This is about the same—'55.

Q. Have you any way of knowing how many persons would go to the Sleeper Lounge Manufacturing Company to purchase Wonder Beds—rather, to purchase Wonder Chairs as a result of—to purchase Wonder Beds as a result of the extensive advertising you have given the term "Wonder Chair"?

Mr. Lyon: Your Honor, I am going to object to the question. There is no foundation laid for this, that he has any knowledge concerning the operation of the defendant whatsoever, or any knowledge of the type of person that [38] comes in and purchases things, or of their activities. This man is president of the corporation. He is not a salesman.

The Court: I will overrule the objection. He may answer that.

You may answer that.

(Testimony of Harold John Miller.)

The Witness: I haven't any idea.

The Court: That more or less takes care of it.

Q. (By Mr. Elliott): Where are you located?

A. Myself?

Q. Where is your business office?

A. 1020 Geary Street, San Francisco.

Q. Is that your base of operations?

A. That is right.

Q. Do you know where the defendant in this case is located?

A. Well, I just found out since this; 3279 Wilshire Boulevard, I believe, from the advertising.

Q. In Los Angeles? A. Yes, Los Angeles.

Q. Can you tell us or give us an estimate of approximately what proportion of the furniture which you sell, or chairs, convertible beds and the like, are sold to persons who have a health problem or have mentioned a health problem to you or to your managers?

A. Well, it could conceivably be about 35, 40 per cent— [39] could be.

Q. Do you ever mention, in selling your chairs in your stores, any features of your chairs that might alleviate or correct health problems?

A. Well, we do mention conversationally that the relaxation would probably help.

Mr. Lyon: I move to strike that answer if it is not limited to his own knowledge. He says "we."

The Witness: Myself.

Mr. Lyon: Including himself or anybody else in the store.

(Testimony of Harold John Miller.)

The Court: I will let that part be stricken. He may answer again.

Q. (By Mr. Elliott): Do you personally, in your sale of your products, ever mention features which might help alleviate health problems?

A. Yes; we mention that it would possibly help health.

Mr. Lyon: Same objection, your Honor. I would like Mr. Miller to answer from his own personal recollection. Eliminate the word "we."

The Witness: I.

The Court: He said I.

Mr. Lyon: If he answers "I," the answer may go in.

The Court: The answer is "I."

Mr. Elliott: That is all the questions we have, your [40] Honor.

The Court: That is all.

Cross-Examination

By Mr. Lyon:

Q. During the course of your testimony, Mr. Miller, I believe you testified that the Bell Manufacturing Company makes convertible furniture?

A. That is right.

Q. Do you make any other type of furniture that is not what you would call "convertible"?

A. Well, we make relaxation furniture.

Q. What is "relaxation furniture"?

A. It is a piece right here.

(Testimony of Harold John Miller.)

Q. Is that a convertible piece of furniture?

A. And relaxing.

Q. What do you mean by the term "convertible"?

A. Converts into a bed.

Q. In other words, converts from what into a bed?

A. From a chair into a bed.

Q. So that if it doesn't convert from a chair into a bed, it is not a "convertible" piece of furniture; is that correct?

A. Could be.

Q. I am asking the question. Is that your understanding? [41]

A. I say it could be.

Q. How does a relaxation piece of furniture distinguish from a convertible piece of furniture?

A. Well, in our case they are almost synonymous.

Q. Well, there must be some difference. You said you make both kinds. What did you have in mind when you said you make both kinds?

A. Well, for instance, we make a rocker.

Q. A rocking chair? A. Yes.

Q. That is a relaxation piece of furniture?

A. Well, a rocker is a rocker. It could relax, but not in the terms that this one does.

Q. I still don't follow the distinction there is between "convertible" and "relaxation."

A. The distinction would be that in a rocker the individual is always in the same position, but the item itself changes positions; the rocker changes, but the individual is still sitting at a right angle, so to speak. With this chair we stretch a fellow out.

(Testimony of Harold John Miller.)

Q. So that as the term is defined by you, if the feet are horizontal and the back pivots—is that what you call a convertible piece of furniture?

A. Not particularly, because here the back pivots and the feet are down. [42]

Q. So that would be just a bed; is that correct?

A. No; that is a relaxing chair, too.

Q. I am talking about the situation that I presented to you, where the feet remain horizontal and the back pivots back and forth.

A. We do make a piece where the back doesn't pivot; it has to be laid down. That would be convertible. It doesn't pivot.

Q. I am not talking about the back now. I am talking about the foot rest portion of the furniture.

A. We make a three-cushion divan that has no foot rest on it.

Q. I am not talking about your product. I am talking about your use of the word "convertible."

A. I imagine in the furniture business a convertible piece of furniture would be a piece that converts into a bed.

Q. From——

Q. From anything, probably.

Q. From a chair?

A. For instance, we make a heart-rest chair that is, in effect, a lounge that converts into a bed—a heart-rest chair converts into a bed.

Q. In your trade-mark registration you refer, as I recall, to "reclining chairs" and "convertible chair-beds." [43] What is a reclining chair?

(Testimony of Harold John Miller.)

A. This one right here.

Q. This is a reclining chair?

A. Yes, and a convertible, too.

Q. And this is a convertible chair-bed? So when you use that terminology in this trade-mark registration, this is the product you are referring to?

A. More or less. I don't know what is in the trade-mark.

Q. I just read it to you; it says "reclining chairs and convertible chair-beds."

Mr. Elliott: I object, your Honor; that is a question of law. The witness is not qualified to answer.

The Court: I will overrule the objection. He may answer.

The Witness: We could.

Q. (By Mr. Lyon): I am not asking what you could. I am asking what that language means in your registration certificate. Does it mean this piece of furniture? A. It could, yes.

Q. Does it mean any other kind of furniture?

A. Conceivably could. It could mean our heart-rest chair.

Q. Have you seen anything that has been presented to you this morning in the way of advertisements or otherwise [44] that shows what a heart-rest chair looks like?

A. I think I mentioned it; yes, in our catalog.

Q. In your catalog—Exhibit 6?

A. That isn't the one.

Q. This is not the one?

(Testimony of Harold John Miller.)

A. No. It is the yellow one.

Q. This one? A. That's it.

Q. Would you identify in there what you call the "heart-rest chair," please—Exhibit 9?

A. (Witness indicating.)

Q. That is the item shown on page 6?

A. Yes.

Q. You testified this morning as to a group of items put out by your organization upon which the word "Wonder" appears. May I inquire as to which of those items carry the trade-mark "Wonder Chair"?

A. This one here is the item.

Q. Perhaps I can refresh your memory, sir.

A. Yes, I remember.

Q. Oh, you do remember?

A. This is the Wonder Chair here.

Q. That is the only item you put out with the trade-mark "Wonder Chair" on it?

A. Yes. [45]

Q. Showing you now Plaintiff's Exhibit 9 and specifically page 2 thereof, I direct your attention to the phrase, at the top of the page, which says, "The Bell Wonder Chair-Bed."

A. Yes.

Q. Is that item the one in front of us?

A. Yes—different style.

Q. Is this the manner in which the trade-mark appears on the label on that device?

A. No. I think it says, "Bell Wonder Chair." It is on the panel, here.

Q. Would you locate it for me, please?

(Testimony of Harold John Miller.)

A. Yes. It is on the panel (stepping down from the witness stand and indicating).

Q. "The Wonder Chair"?

A. "The Wonder Chair."

Q. That is the manner in which you presently use the trade-mark; is that correct? A. Yes.

Q. How long have you used it in that format?

A. For many years, to my knowledge.

Q. As long as you can remember?

A. I would have to think. As far as I know, we have used that for quite a while (witness resuming the witness stand). [46]

Q. You testified, I believe, that you have been with the organization for 15 years? A. Yes.

Q. Has it been used in that form for 15 years?

A. As far as I know, it was.

Q. The word "Bell" has always been superimposed above the word "Wonder Chair"?

A. I believe so.

Q. The wand is always stuck through with the stars on the end of it? A. Not always.

Q. Not always?

A. I mean, now it is, but I don't know over the 15-year period.

Q. But you do know the word "Bell" was always superimposed above the word "Wonder"?

A. I said I imagine. I know it is now.

Q. Now, Mr. Miller, what do your duties as President of the organization involve?

A. I should say general manager.

Q. General manager? A. Yes.

(Testimony of Harold John Miller.)

Q. Do you do any sales work? A. Oh, yes.

Q. Do you actually sell items? [47]

A. I do.

Q. Do you make trips to your various offices in order to promote the sale of these items?

A. Yes.

Q. Do you contact the purchasing public, the individual buying these items?

A. In what territory?

Q. Any territory.

A. In San Francisco, I do.

Q. You mean you are on the floor of your shop and a customer comes in and you will talk to him?

A. On occasion.

Q. How often does that occur?

A. Could happen. It depends how heavy the traffic is.

Q. In other words, you help out when the staff in the front office is too busy? A. Yes.

Q. How many people would you say you talk to in a year or a month or a week?

A. Well, this week I, personally, sold about five chairs.

Q. You talked to five customers or 45—how many?

A. I think, to tell the truth, about seven.

Q. You talked to about seven, and about five of them purchased those items? [48] A. Yes.

Q. Do you have any kind of display windows in front of your office?

A. In our San Francisco store?

(Testimony of Harold John Miller.)

Q. Yes.

A. Oh, yes, sure. My office is behind the store.

Q. So that the public walking down the street can look in the window and see the merchandise you are selling?

A. Yes.

Q. They come in and ask, "How much is that chair in the window?"

A. Could be. I wouldn't say they just come in. They come in through advertising, mostly. In San Francisco we are in an isolated location.

Q. So that the average person has to read your ads and find out where you are and come down to see you?

A. That would be my judgment. I think so.

Q. Is that true of the Los Angeles offices and the other offices? Or do you know?

A. Well, of course, you know Los Angeles. Hill Street is more or less isolated, I would say, as far as general foot traffic is concerned—Hill and Olympic. Crenshaw, I imagine, is pretty good foot traffic there.

Q. But the average person reads your advertisement and finds out where your organization is and goes in and buys one [49] of these from you?

A. That would be my assumption.

Q. What type of person is it that comes in usually to purchase one of these?

A. Well, on an average, middle-aged and older people.

Q. Older people?

A. Middle age and older. Occasionally, we sell younger people, too.

(Testimony of Harold John Miller.)

Q. But the great majority of them are older people? A. Yes.

Q. They buy this as more or less a luxury item?

A. I wouldn't say so. I would say it would be essentially practical.

Q. As any piece of furniture they buy around their house; is that correct?

A. Well, I presume they have a specific need for a bed-chair and relaxing chair. As I said this morning, it is unique.

Q. There is no other like it, to your knowledge?

A. We make what we call the "Bell Lounger" that relaxes but doesn't convert, you see.

Q. We will get back to that again. I have a little difficulty figuring out what you mean when you say "relaxes but doesn't convert."

A. I just explained; this relaxes and [50] converts.

Q. When you use the term "convert" or "relax," what do you mean by that?

A. Well, we use it parallelly on this deal, because that is precisely what it does; it relaxes and converts.

Q. What do you mean by "it converts"?

A. Converts into a bed.

Q. From what?

A. Well, I presume a chair. You couldn't call it anything else.

Q. What is the price range of this item?

A. This particular item, from 134 up, depending on the quality of the—

(Testimony of Harold John Miller.)

Q. Up to what?

A. A fellow could go as high as 275 for that. This particular one, as I told somebody this morning, is around 200.

Q. What does the fluctuation of the price depend upon?

A. On the quality of the covering. For instance, this particular one—I didn't notice when they sent it down—has a kick plate which would change the price, and has a special arm.

Q. All of these you sell are upholstered; is that correct?

A. Yes.

Q. And the price will depend on the quality of the [51] upholstering which you put on it?

A. Essentially, plus any other special device. Sometimes we build these to order, you know. When a tall man comes in and if we build the back higher we charge them so much an inch, or if we have to make other modifications to fit him we charge him for it sometimes.

Q. Those are what you call "custom made"?

A. I presume most of our stuff would be, because very seldom do we sell the pieces themselves from the floor.

Q. In other words, the great majority of your trade is what you call "custom made," just like when you go to have a tailor made suit of clothes made, they come in and say "we want a chair in this fabric or this style"?

A. Yes, we do make them up. Of course, occasionally our people do sell them from the floor.

(Testimony of Harold John Miller.)

Q. Occasionally they sell them from the floor, but the great majority of your business is the custom built type? A. Yes.

Q. So that people know with whom they are dealing and they make a specific order for a specific one of your chairs; is that right?

A. Could be.

Q. You testified that 35 to 40 per cent of the sales that you made were to people with health problems? A. Could be. [52]

Q. Upon what did you base that testimony?

A. Well, a lot of people come in with arthritis and they want to relax, and people with heart conditions.

Q. Where did you get the number 35 to 40 per cent?

A. Well, it seems a lot of our middled-aged and older people come in for relaxation on account of some condition.

Q. Where did you get the figure 35 to 40 per cent?

A. Well, it seems that most of our chairs are sold to that type of people, and my guess is—

Q. I appreciate that. But where did you get the figure 35 to 40 per cent? You made that up? It was your idea?

A. Somebody asked me that question, and I answered it.

Q. That is correct. But have you ever made any analysis of it—sales analysis?

(Testimony of Harold John Miller.)

A. That is just my general knowledge.

Q. Have you ever made any sales analysis through your organization as to where these chairs go and who buys them?

A. We have no specific analysis, but after 15 years a fellow more or less keeps his finger on the pulse.

Q. Yes, but as I understand it you only sell these items when the floor is crowded and you help out, was your testimony.

A. No, I wouldn't say. We have a small office and I [53] hear what is going on. As a matter of fact, I make it my business to know what is going on.

Q. So a lot of that information is based upon what somebody else told you; is that correct?

A. Not particularly, because usually, like all salespeople, anybody connected with sales will bear out, when a person makes a sale, they say, "Well, we sold so and so. He has asthma" or something. I hear personally practically about every sale.

Q. In other words, your office is such that you can hear what is going on all of the time?

A. Yes.

Q. The figure 35-40 per cent is then based upon what you hear?

A. What I overhear, and from my own experience. It seems if a person wants a straight chair and is in good health, they buy it.

Q. Mr. Miller, have you ever received any mail directed to the Sleeper Lounge Company?

(Testimony of Harold John Miller.)

A. Not to my knowledge.

Q. Your organization?

A. Not to my knowledge.

Q. Has your organization ever received any telephone calls directed to the Sleeper Lounge Corporation? A. Not to my knowledge. [54]

Q. Has your organization ever received any purchase orders from anybody directed to the Sleeper Lounge Company?

A. Not to my knowledge.

Q. Has anybody ever come into your organization and asked for an electric bed?

A. Not to my knowledge.

Q. Has anybody come into your organization and asked for a sleeper lounge?

A. Not to my knowledge.

Q. Who else in your organization would have any knowledge superior to yourself on these last series of questions?

A. I wouldn't say it is superior, but they might have actual knowledge of somebody asking for it. I didn't hear about it.

Q. But you overhear your sales personnel when they sell them to somebody else?

A. Not in Southern California.

Q. Not in Southern California.

Mr. Lyon: That is all I have. No further questions.

The Court: All right.

(The witness steps down.) [55]

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the testimony of Harold John Miller had in the above-entitled cause on January 25, 1956, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at San Diego, California, May 18, 1957.

/s/ JOHN SWADER,
Official Reporter.

[Endorsed]: Filed May 20, 1957. [56]